

2

Supreme Court, U.S.
FILED

OCT 6 1989

No. 89-499

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD K. FIRTH, FIRTH CONSTRUCTION
CORPORATION and RICK FIRTH REALTY, INC.,
Petitioners,

vs.

SOLGAR MARYLAND REALTY INC., SOLGAR
CO., INC., and ALLEN SKOLNICK,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RICHARD A. LIPPE
Meltzer, Lippe, Goldstein & Wolf, P.C.
190 Willis Avenue
Mineola, New York 11501
(516) 747-0300

Attorneys for Respondents

Of Counsel:

RICHARD GABRIELE
Meltzer, Lippe, Goldstein & Wolf, P.C.

13 pp

**COUNTER-STATEMENT OF THE
QUESTIONS PRESENTED**

- 1) Should the Court grant certiorari to review the determination of the courts below that any alleged oral agreement in this case was, as a matter of Maryland contract law, too vague and indefinite to be enforceable?
- 2) Should the Court grant certiorari to review the determination of the courts below that the action was barred under Maryland law by the applicable statute of limitations?
- 3) Should the Court grant certiorari to review the determination of the courts below that federal diversity jurisdiction existed?

TABLE OF CONTENTS

	<u>Page</u>
Counter-Statement of the Questions Presented	i
Table of Contents.....	ii
Table of Authorities	iii
Counter-Statement of the Case	2
Summary of Argument	4
Argument	5
A) The Courts Below Correctly Decided That The Oral Agree- ment Alleged In This Case Was Too Indefinite To Con- stitute A Legally Enforceable Contract.....	5
B) The Courts Below Correctly Decided That This Action Was Barred By The Maryland Statute of Limitations.....	6
C) Respondents Never Properly Or Timely Challenged In The Courts Below The Facts Establishing Federal Diversity Jurisdiction.....	7
Conclusion.....	9

Table of Authorities

	<u>Page(s)</u>
CASES:	
Computer Servicers Inc. of Greenville v. Beacon Manufacturing Company, 443 F. 2d 907 (4th Cir. 1971).....	6
Johnson v. Nadwodny, 55 Md. App. 227, 461 A. 2d 67 (1983).....	6
Kentucky v. Powers, 201 U.S. 1 (1906).....	8
Marmott v. Maryland Lumber Co., 807 F. 2d 1180 (4th Cir. 1986).....	6
Owen Equipment and Erection Co. v. Kroger, 437 U.S. 65 (1978).....	8
Poffenberger v. Risser, 290 Md. 631, 431 A. 2d 677 (1981).....	6
Strickland Engineering Corp. v. Seminar Inc., 210 Md. 93, 122 A. 2d 563 (1956).....	6
Wilson v. Republic Iron & Steel Co., 257 U.S. 92 (1921).....	8
STATUTES:	
Annotated Code of Maryland, Courts and Judicial Pro- ceedings, Section 5-101	6
28 United States Code Section 1332	3, 8
28 United States Code Section 1441	3
28 United States Code Section 1446	3
MISCELLANEOUS:	
Corbin on Contracts, § 95	6
Restatement of Contracts (Second), § 33	6



IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD K. FIRTH, FIRTH CONSTRUCTION
CORPORATION AND RICK FIRTH REALTY, INC.,
Petitioners,

vs.

SOLGAR MARYLAND REALTY INC., SOLGAR
CO., INC., AND ALLEN SKOLNICK,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Respondents Allen Skolnick, Solgar Co. Inc. and Solgar Maryland Realty Inc. (hereinafter jointly referred to as "Solgar")¹ respectfully request that the Court deny the Petition for Writ of Certiorari to review a decision of the United States Court of Appeals for the Fourth Circuit dated April 28, 1989, and the subsequent order of the Court of Appeals for the Fourth Circuit entered on June 5, 1989 denying petitioners' application for a rehearing and suggestion for a rehearing in banc.

¹ Pursuant to Supreme Court Rule 28.1, the Court is informed that Solgar Maryland Realty Inc. was merged out of existence on December 18, 1986 and, accordingly, has no parents, affiliates or subsidiaries; that respondent Solgar Co. Inc. has no parent or subsidiary companies; and that respondent Solgar Co. Inc. has the following affiliated companies: Chancery Associates, River Run Associates, Oxford Laboratories, Inc., and GS Technologies, Inc.

COUNTER-STATEMENT OF THE CASE

This petition for certiorari arises in an action filed against Solgar by petitioners Richard K. Firth, Firth Construction Corporation, and Rick Firth Realty, Inc. (hereinafter jointly referred to as "Firth") on September 2, 1987, in the Circuit Court of Worcester County, State of Maryland. The action involves the breach of an alleged joint venture agreement relating to the purchase by Solgar in October 1981 of 100-plus undeveloped acres of land located in Worcester County, Maryland ("the Property"). The complaint alleges that there was an oral agreement among the parties concerning the acquisition, development and eventual sale of the Property.

Solgar has denied categorically that the parties ever had an oral joint venture agreement concerning the acquisition, development or sale of the Property. Although Firth states there were "a number of witnesses" to this agreement (Petition at 7), Firth has never provided any court with a single affidavit from a single one of these alleged witnesses. There was also no written joint venture agreement among the parties relating to the Property, nor any acknowledgment by Solgar in writing of any kind at any time that such a joint venture agreement existed.

However, assuming *arguendo* the existence of such an oral "agreement", it was nevertheless unenforceable because, even as described and amplified by Firth in affidavits and submissions to the District Court, the alleged contract was indefinite, ambiguous and demonstrated an absence of agreement on material and significant terms. Furthermore, even if there did exist a legally enforceable oral contract concerning the Property, Firth delayed bringing the action for more than three years after he actually knew or should have known that any alleged agreement had been breached by Solgar. The action is therefore barred under Maryland law by the applicable three-year statute of limitations.

After commencement of the action in the state court, Solgar filed to remove the action to the United States District Court for the District of Maryland, pursuant to 28 U.S.C. Sections 1332, 1441 and 1446, on the basis of diversity jurisdiction. The removal petition contained the requisite allegations of jurisdictional fact, and the action was thereupon removed. Petitioners never challenged in the District Court the jurisdictional facts alleged in the removal petition, nor opposed the removal petition in the District Court, nor requested the District Court to remand the action back to state court for lack of federal jurisdiction.

On April 18, 1988, Solgar moved in the District Court to dismiss the complaint on two grounds, *i.e.*, that the alleged oral agreement was unenforceable as a matter of contract law because it was indefinite and lacked agreement on essential terms, and that the action was barred by the Maryland statute of limitations. Based on the extensive submissions of the parties, the District Court treated the motion as one for summary judgment and, after finding in favor of Solgar on each of the grounds raised, granted judgment in Solgar's favor. It was the determination of the District Court ". . . that the alleged oral agreement is too uncertain and indefinite in its terms to be valid and that, in any event, (the) claims are time-barred."

Firth moved in the District Court to alter or amend the judgment. This request was denied. Firth then appealed to the United States Court of Appeals for the Fourth Circuit. By decision dated April 28, 1989, the Fourth Circuit denied the appeal and affirmed the award of summary judgment in Solgar's favor "on the well-reasoned opinion of the District Court". Firth then petitioned the Fourth Circuit for a rehearing and suggestion for a rehearing in banc. The Fourth Circuit denied this request by order entered on June 5, 1989. Firth now seeks a writ of certiorari from this Court.

SUMMARY OF ARGUMENT

The Court should deny the petition. This case presents no novel or compelling issues, it does not involve any legitimate federal question and there is certainly no conflict among the Circuits as to any of the issues raised by Firth. This is a simple breach of contract case in which the courts below correctly found, as a matter of Maryland law, that the alleged oral agreement—assuming it existed—was too vague to be enforceable, and that the action had been untimely commenced under the Maryland statute of limitations. Furthermore, Firth's belated claim concerning the lack of federal diversity jurisdiction is frivolous and was never properly raised in the courts below.

ARGUMENT

The Court Should Deny The Petition Because It Does Not Present Any Novel Or Important Questions Of Federal Law, Because There Is No Conflict Among The Federal Courts Of Appeals On Any Issue Raised By The Petition And Because All Issues Raised By The Petition Were Correctly Decided By The Courts Below

A) The Courts Below Correctly Decided That The Oral Agreement Alleged In This Case Was Too Indefinite To Constitute a Legally Enforceable Contract

In this case, there was no written agreement among the parties concerning a joint venture on the Property, and no written acknowledgment by Solgar at any time of any such agreement. Solgar also denied any oral agreement among the parties.

However, even assuming *arguendo* that an oral agreement was made as alleged, the parties nevertheless did not enter into a binding contract because the material terms of the alleged agreement were too indefinite and uncertain to constitute a legally enforceable agreement. The alleged oral agreement, as described and fleshed out by Firth in extensive submissions to the District Court, was indefinite and ambiguous as to the most basic and essential terms of a contract, thus precluding its enforcement. For example, the alleged oral agreement did not manifest any "meeting of the minds" about such critical terms as the identity of the parties to the alleged agreement, the scope of the alleged joint venture arrangement, or the allocation of profits and losses among the parties. Furthermore, although he tried to do so, Firth could not remedy the absence of these missing terms simply by claiming that the terms of the alleged agreement were intended to be "similar" to a prior unfinalized agreement (attached as Appendix C to the Petition for Certiorari) discussed by the parties several years earlier with respect to an entirely different parcel of land.

It is a fundamental principle of contract law that, before a binding contract comes into existence, there must be certainty and definiteness with respect to material terms. *Restatement of Contracts* (Second), § 33; *Corbin on Contracts*, § 95; *Marmott v. Maryland Lumber Co.*, 807 F. 2d 1180 (4th Cir. 1986); *Strickland Engineering Corp. v. Seminar Inc.*, 210 Md. 93, 122 A.2d 563, 568 (1956). As the District Court properly concluded, and as the Court of Appeals affirmed, that certainty and definiteness did not exist here.

Furthermore, Firth's objection to the disposition of this case by way of summary judgment is also unwarranted. There is no legal authority to support Firth's contention that any action which raises a claim involving a contract, no matter how frivolous, can never be resolved by summary judgment. It was Firth's burden under F.R. Civ.P. 56 to show the existence of a genuine factual issue with respect to whether the parties had entered into an enforceable agreement and, having failed to do so even under the most favorable view of the facts as presented by Firth to the courts below, summary judgment was appropriately granted. *See, e.g., Computer Servicenters Inc. of Greenville v. Beacon Manufacturing Company*, 443 F. 2d 907 (4th Cir. 1971).

B) The Courts Below Correctly Decided That This Action Was Barred By The Maryland Statute of Limitations

Under Maryland law, a three-year statute of limitations applies in this case. Annotated Code of Maryland, *Courts and Judicial Proceedings*, §5-101. This began to run when Firth knew, or reasonably should have known, of the wrong. *Johnson v. Nadwodny*, 55 Md. App. 227, 461 A.2d 67 (1983); *Poffenberger v. Risser*, 290 Md. 631, 431 A.2d 677 (1981). In this case, Firth's action was untimely commenced.

Assuming *arguendo* that a binding agreement with sufficient legal certainty and definiteness had come into existence on July 7, 1981, as alleged by Firth, Solgar left no doubt from the moment it purchased the Property and from the very outset of the alleged arrangement that it did not consider Firth

as its "partner" and was breaching any alleged agreement. Thus, in October 1981, Solgar listed Firth as a broker, not as a principal, on the purchase documents concerning the Property. At the same time, it sent Firth the purchase documents to sign as a broker, not as a principal, and paid Firth a \$51,000 brokerage commission as a broker. Solgar never asked Firth to contribute toward the purchase price of the Property, or to any subsequent expenses. Firth had no role at all in the development of the Property after the commencement of the alleged joint venture. Firth did not participate in meetings related to the development of the Property. Firth was orally told on numerous occasions that Solgar did not consider Firth to have any partnership with Solgar vis-a-vis the Property. In May 1982, the Maryland Real Estate Commission was informed in writing that Firth did not have the right to show or sell the Property. In June 1984, Firth was expressly notified in writing by Solgar that "there is no agreement between us". Plainly, Firth knew or should have known right from the beginning, and certainly by June 1984, that Solgar was breaching any alleged oral joint venture agreement. This action, commenced 6 years after the acquisition of the Property by Solgar and more than 3 years after Firth was explicitly told by Solgar that "there is no agreement between us", was untimely and was barred by the applicable Maryland three-year statute of limitations. While Firth has tried to avoid this result by relying on the doctrine of "anticipatory breach", this strained argument was thoroughly briefed and made to each of the courts below, and was rejected as factually inapplicable.

C. Respondents Never Properly Or Timely Challenged In The Courts Below The Facts Establishing Federal Diversity Jurisdiction

Firth has raised a belated and frivolous objection to the existence in this case of federal diversity jurisdiction. This issue was never timely raised or preserved in the courts below, and it is only being raised now as a last-ditch effort to avoid an adverse decision on the merits and to inject some hint of a federal question into the Petition for Certiorari.

Solgar filed a removal petition which alleged that, for diversity purposes, complete diversity existed among the parties. This satisfied the jurisdictional requirements of 28 U.S.C. § 1332. *Owen Equipment and Erection Co. v. Kroger*, 437 U.S. 365, 373 n.13 (1978). Firth never filed any opposition to this removal petition in the District Court. Firth never challenged in the District Court the jurisdictional facts alleged in the removal petition. Furthermore, well aware that there were no legitimate grounds on which to challenge diversity jurisdiction, Firth did not demand any discovery in the District Court to uncover facts that would enable him to establish the purported lack of diversity jurisdiction. Firth also never sought in the District Court a remand of the action back to the Maryland courts. In other words, Firth totally failed to raise in the District Court the issue of the lack of diversity jurisdiction. By reason of Firth's failure to properly or timely challenge the factual jurisdictional assertions, they must be deemed true for jurisdictional purposes. *Kentucky v. Powers*, 201 U.S. 1, 33-35 (1906); *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921).

Moreover, when Firth appealed to the Fourth Circuit, he did not even then raise the issue of the purported lack of diversity jurisdiction. Firth's Notice of Appeal made no reference to the alleged jurisdictional problem. Similarly, the Statement of Issues in Firth's main brief to the Court of Appeals listed two questions for the Fourth Circuit to resolve—*i.e.*, the issue concerning the vagueness of the alleged contract and the issue of timeliness—but it never in any way raised or referred to a possible jurisdictional question. In fact, Firth's first reference to this purported lack of diversity jurisdiction was contained in a footnote to Firth's Reply Brief to the Court of Appeals, at a point in the appellate process when Solgar did not even have a right to respond to it.

Firth has never properly or timely challenged the jurisdictional facts alleged in the record because this is a patently frivolous contention. Each of the petitioners is a citizen of the State of Maryland, or has its principal place of business

there. Firth has never contended, and does not now contend, otherwise. Respondent Skolnick is a citizen of the State of New York. Respondent Solgar Maryland Realty Corp. had been merged out of existence prior to the time this action was commenced, as documented to the District Court by certified copies of relevant corporate documents attached to the Petition For Removal. Respondent Solgar Co. Inc. is incorporated under the laws of the State of New York, with its principal place of business in New York. These facts were stated to the District Court in the sworn Petition for Removal, as well as in sworn affidavits submitted to the District Court.

In sum, complete diversity of jurisdiction existed among the parties when the action was commenced as well as when it was removed from state court to federal court. Firth has no basis for contending otherwise, and that is why he never raised this issue or challenged the jurisdictional facts alleged by Solgar in the District Court.

CONCLUSION

For The Foregoing Reasons, the Court Should Deny Firth's Petition For a Writ of Certiorari.

Respectfully submitted,

RICHARD A. LIPPE
Meltzer, Lippe, Goldstein & Wolf, P.C.
190 Willis Avenue
Mineola, New York 11501
(516) 747-0300
Attorneys for Respondents

Of Counsel:

RICHARD GABRIELE
Meltzer, Lippe, Goldstein & Wolf, P.C.